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LaDonna Castañuela
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Texas Commission on Environmental Quality
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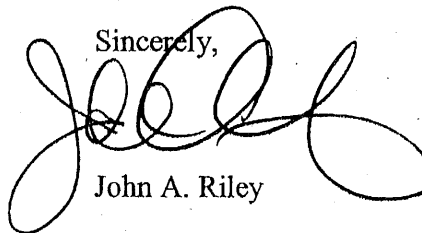
Re: SOAH Docket No. 582-06-1502; TCEQ Docket No. 2006-0195-AIR
Application of Oak Grove Management Company LLC For Proposed
Air Permit No. 76474 and PSD-TX-1056

Dear Ms. Castañuela:

Enclosed for filing in the above-referenced and numbered proceeding is one original and twelve copies of Applicant Oak Grove Management Company LLC's Responses to the Exceptions to the Administrative Law Judges' Proposal for Decision. Please date stamp one of the twelve copies and return it to the awaiting courier. The remaining eleven copies are for the TCEQ Commissioners.

Thank you for your attention to this matter.

Sincerely,



John A. Riley

Enclosures

cc: Service List
Honorable Carol Wood (*via hand delivery*)
Honorable Thomas Walston (*via hand delivery*)
SOAH Docket Clerk (*via hand delivery*)

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SOAH DOCKET NO. 582-06-1502
TCEQ DOCKET NO. 2006-0195-AIR

APPLICATION OF
OAK GROVE MANAGEMENT
COMPANY LLC FOR PROPOSED
AIR PERMIT NO. 76474 AND
PSD-TX-1056

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BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

APPLICANT OAK GROVE MANAGEMENT COMPANY LLC'S RESPONSES
TO THE EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGES'
PROPOSAL FOR DECISION

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SOAH DOCKET NO. 582-06-1502
TCEQ DOCKET NO. 2006-0195-AIR

APPLICATION OF	§	BEFORE THE STATE OFFICE
OAK GROVE MANAGEMENT	§	
COMPANY LLC FOR PROPOSED	§	OF
AIR PERMIT NO. 76474 AND	§	
PSD-TX-1056	§	ADMINISTRATIVE HEARINGS

APPLICANT OAK GROVE MANAGEMENT COMPANY LLC'S RESPONSES
TO THE EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGES'
PROPOSAL FOR DECISION

TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW Applicant Oak Grove Management Company LLC ("*Applicant*" or "*Oak Grove*") and files these responses to the parties' exceptions to the Administrative Law Judges' ("*ALJs*") Proposal for Decision ("*PFD*") in the above-captioned matter. As set forth below, Oak Grove agrees with the exceptions proposed by the Executive Director because they are supported by the rules, policies, and practices of the Texas Commission on Environmental Quality ("*TCEQ*" or "*the Commission*"), and the substantial weight of the evidence in the record.

The Executive Director's exceptions address the sole issue raised by the ALJs in the PFD – the technical practicability of Oak Grove's proposed state-of-the-art nitrogen oxide ("*NO_x*") and mercury emission controls. The Executive Director correctly states that the NO_x and mercury emission limits set forth in the proposed permit have been demonstrated through engineering evaluation to be technically practicable, and must be further demonstrated, through post-permit performance testing, to be achievable in operation on an ongoing basis. The Executive Director correctly excepts to the PFD because the proposed findings and conclusions are based on an incomplete analysis of the

TCEQ's best available control technology ("**BACT**") guidance,¹ particularly the aspects of the guidance that relate to the Executive Director staff's engineering analysis of new control technologies and new applications of proven technologies. Moreover, the ALJs' proposal is directly at odds with the overarching policy of the TCEQ to promote state-of-the-art technologies, and new applications of proven technologies, in controlling air emissions.

In view of the Commission's policies regarding compliance with the technical practicability element of the TCEQ's BACT analysis, the Executive Director properly concludes that the PFD is predicated on a flawed premise. Accordingly, the Executive Director requests that the Commission issue an order finding that Oak Grove satisfied its evidentiary burden in proving that its proposed NO_x and mercury emissions controls are technically practicable and, consequently, that the proposed Oak Grove Steam Electric Station ("**OGSES**") will comply with applicable state and federal air quality standards and will not cause or contribute to a condition of air pollution. As explained below, Oak Grove supports the Executive Director in this request.

Moreover, as set forth more fully below, the exceptions proposed by Protestant Robertson County: Our Land, Our Lives ("**Protestant**") and the Office of Public Interest Counsel ("**OPIC**") are not supported by the evidentiary record; and, there is no basis for amending the ALJs' proposed findings or the PFD as they request. Protestant's and OPIC's exceptions concern the sufficiency of Oak Grove's ozone impacts analysis. This issue was fully addressed by Oak Grove in its Closing Argument and subsequent Response Brief. Moreover, this issue was resolved by the Commission in its recent

¹ See generally Oak Grove Ex. 15 (*Evaluating Best Available Control Technology in Air Permit Applications* (RG-383) (April 2001)) (hereinafter referred to as the "**BACT Guidance**").

affirmation of the TCEQ requirements for evaluating ozone impacts.² Oak Grove unquestionably followed the longstanding TCEQ policies and practices for evaluating ozone impacts and satisfied the established TCEQ requirements. In addition, Oak Grove went beyond the TCEQ permitting requirements and demonstrated through photochemical modeling that emissions from the proposed OGSES will not affect compliance with the National Ambient Air Quality Standard (“*NAAQS*”) for ozone in either the Dallas-Fort Worth (“*DFW*”) nonattainment or Austin Early Action Compact (“*Austin EAC*”) areas. Both Protestant and OPIC have failed to refute or otherwise rebut the overwhelming evidence put forward by Oak Grove regarding the adequacy of its ozone impacts analysis. Nevertheless, in response to Protestant’s and OPIC’s exceptions, Oak Grove addresses this issue below.

ARGUMENT

I. THE RECORD EVIDENCE REGARDING BACT PROVED THAT THE PROPOSED NO_x AND MERCURY CONTROL TECHNOLOGIES ARE TECHNICALLY PRACTICABLE AND FEASIBLE FOR THE OGSES UNITS

As set forth more fully in Oak Grove’s Exceptions, the PFD is premised upon an incorrect belief that the technical practicability element of the TCEQ BACT analysis requires a proposed emissions control technology to have been previously utilized in commercial applications identical to that proposed by the applicant. The exceptions filed by the Executive Director confirm that Oak Grove’s interpretation of technical practicability is correct and that the analysis in the PFD is incomplete. Specifically, in his exceptions the Executive Director emphasizes that technical practicability is

² See Order Granting the Application of Sandy Creek Energy Associates, L.P. for Air Quality Flexible Permit No. 70861/PSD Permit No. PSD-TX-1039; TCEQ Docket No. 2005-0781-AIR; SOAH Docket No. 582-05-5612 (May 26, 2006) (hereinafter referred to as the “*Sandy Creek Order*”), Findings of Fact Nos. 74-75 and Conclusions of Law Nos. 23 and 49.

established through demonstrated success of an emission reduction option based upon use, and/or “*engineering evaluation* of a new technology.”³ As explained by the Executive Director, an engineering evaluation of new control technologies, or a new application of proven technologies, does not eliminate *all risks to the applicant* that the proposed emission controls (that were determined by the Executive Director to constitute BACT) will operate as anticipated and achieve the permitted emission rates. Rather, the BACT process is intended to promote the advancement of state-of-the-art air pollution control technologies and new uses of proven control technologies, and progressively lower emissions. Furthermore, Oak Grove is held to the emission limits set by the permit and must demonstrate compliance with these limits under the express terms of the permit.

Thus, as explained by the Executive Director, if, despite the substantial evidence presented by Oak Grove in support of the technical practicability of its proposed NO_x and mercury controls, there remains concern about the ability of these controls to achieve the respective emission limits established in the draft permit, the ALJs should consider that upon issuance of the permit all representations in the application become enforceable conditions upon which the permit is issued. Additionally, the Executive Director notes that, consistent with applicable federal New Source Performance Standards,⁴ the draft permit contains specific post-construction compliance demonstration requirements.⁵ These mandatory compliance demonstration requirements will ensure that the NO_x and mercury emissions limits established in the draft permit will be met on an ongoing basis.

³ Oak Grove Ex. 15 at p. 4; Oak Grove Ex. 1, p. 53, lines 5-8 (Moon).

⁴ See 40 C.F.R. § 60.8.

⁵ See Draft Permit, Special Conditions Nos. 12A, 49, and 50.

In view of the valid exceptions raised by the Executive Director that bear directly on the broader TCEQ BACT policy and legal questions raised by the PFD, and for the reasons set forth by Oak Grove in its Closing Argument briefs and Exceptions, it is evident that the recommendation in the PFD regarding the technical practicability of Oak Grove's proposed NO_x and mercury emissions controls is incorrect. In fact, even Protestant agrees that the ALJs' flawed interpretation of the TCEQ BACT analysis has resulted in a "strange" PFD. Specifically, in addressing the PFD, Protestant observes:

The ruling is strange. It basically says that the control technology for NO_x and mercury has not been demonstrated on a commercial scale with lignite fuel, and that the TCEQ guidance document for "Best Available Control Technology" (BACT) says that such a demonstration is necessary ... It is unclear what TXU needs to do to remedy this situation. Should they propose other control methods that would not clean the emissions up as much? Should they dramatically weaken the BACT rate they must achieve so that the "preponderance of evidence" would show they could meet those weaker emission limits with the current controls?⁶

Consequently, the ALJs should revise their PFD to reflect a complete and corrected analysis of the elements and considerations in a TCEQ BACT determination and acknowledge the enforceable emission limits in the permit. Moreover, since neither Protestant's nor OPIC's exceptions to the PFD identify or raise any other issues regarding the myriad of BACT determinations that underlie the proposed emission limits in the draft permit, any and all BACT issues should be resolved in favor of Oak Grove.⁷ Thus, for the reasons cited by both the Executive Director and Oak Grove, the erroneous

⁶ Robertson County: Our Land, Our Lives, *Judges Rule in Our Favor, Observations on the Ruling*, at www.ourlandourlives.net/news.html (Sept. 21, 2006).

⁷ While neither OPIC nor Protestant have excepted to the ALJs' finding that Oak Grove's proposed NO_x and mercury controls are not technically practicable, the evidentiary record clearly reflects their position that not only are these controls technically practicable, but, in fact, *lower* emission limits than the limits established in the draft permit are feasible through the use of these controls. See Tr. p. 528, line 9 to p. 530, line 2 (Hamilton); OPIC Closing Argument at 6.

interpretation of TCEQ BACT policy in the PFD should not stand and, absent a revision of the PFD to reflect a complete, corrected analysis consistent with the exceptions filed by the Executive Director and Oak Grove, the Commission should reject the analysis in the PFD regarding the interpretation of BACT requirements.

II. OAK GROVE DEMONSTRATED BY A PREPONDERANCE OF THE EVIDENCE THAT ITS PROPOSED EMISSIONS WILL COMPLY WITH ALL NATIONAL AMBIENT AIR QUALITY STANDARDS AND STATE REQUIREMENTS, INCLUDING OZONE

The exceptions filed by Protestant and OPIC do not identify any issue with respect to the proposed OGSES's ability to meet the NAAQS or any State standard, other than ozone. Thus, Oak Grove's compliance with other NAAQS and Texas air quality standards are not in question. With respect to ozone, after reviewing the record, the Commission will find that Oak Grove demonstrated by a preponderance of the evidence that the proposed OGSES will comply with the NAAQS for ozone, as determined through application of the TCEQ's longstanding rules and policies, as well as the use of photochemical modeling that is not required by the TCEQ in individual permitting matters. The sufficiency of Oak Grove's ozone impacts analysis was fully addressed in Oak Grove's Closing Argument and subsequent Response Brief. In their exceptions, Protestant and OPIC do not refute or otherwise counter the evidence and analysis of the photochemical modeling put forth by Oak Grove. There is no question that this issue should be resolved in Oak Grove's favor. Nevertheless, in response to Protestant's exceptions and the similar issues raised in OPIC's exceptions, Oak Grove briefly addresses below the adequacy of its ozone impacts analysis and demonstrated compliance with the NAAQS for ozone.

A. Application of the TCEQ Screening Technique for the Evaluation of Ozone Impacts

During the hearing on the merits, all witnesses testifying on the topic of Oak Grove's ozone impacts evaluation, including Protestant's own expert Dr. Ramon Alvarez,⁸ agreed that Oak Grove followed longstanding TCEQ guidance in determining that the proposed OGSES will be "NO_x dominated," and, consequently, the local ozone impacts will be insignificant.⁹ All relevant witnesses also agreed that, having made the "NO_x dominated" demonstration, as required by TCEQ's ozone screening technique, the Commission appropriately did not require this Applicant, and has never required any other applicant, to perform an additional analysis of ozone impacts from the proposed OGSES for areas that are remote from the location of the facility.¹⁰ Moreover, according to the "longstanding interpretation of the Commission's rules, regulations, and guidance,"¹¹ as well as recent interpretations by the Commission of these requirements for demonstrating compliance with the NAAQS for ozone,¹² having performed the ozone impacts analysis in accordance with TCEQ guidance, Oak Grove satisfactorily demonstrated that it will not cause or contribute to an exceedance of the ozone NAAQS in the area of the OGSES. Thus, the analysis for air permitting purposes is complete.¹³

⁸ Tr. p. 68, lines 21-22 (Moon); Oak Grove Ex. 19, p. 41, lines 3-15 (Castro); Tr. p. 669, lines 10-15 (Hamilton); Oak Grove Ex. 41, p. 20 of 23 (Zimmerman); Tr. p. 885, line 12 to p. 886, line 3, p. 888, line 16 to p. 889, line 4, p. 894, line 5 to p. 895, line 13 (Alvarez).

⁹ Oak Grove Ex. 25.

¹⁰ Oak Grove Ex. 19, p. 41, lines 3-15 (Castro); Oak Grove Ex. 41, p. 20 of 23 (Zimmerman).

¹¹ See Sandy Creek Order, Conclusion of Law No. 23.

¹² See generally Sandy Creek Order.

¹³ See Sandy Creek Order, Findings of Fact Nos. 74-75 and Conclusions of Law Nos. 23 and 49 (affirming the use of current TCEQ guidance by applicants such as Oak Grove and concluding that the "NO_x dominated" demonstration indicates that there "would not be a significant change to the current ozone levels in the local attainment area due to the Station's emissions" and "[t]he Station will not cause any ozone NAAQS exceedances in the local attainment area").

Despite the uncontroverted, overwhelming evidence supporting the completeness of Oak Grove's permit application and adequacy of its ozone impacts demonstration, Protestant and OPIC request that the Commission issue an order stating that Oak Grove's application was incomplete because it did not include an analysis that has, to date, never been required of an applicant and is not established, defined, or otherwise required by applicable law, rule, or policy. It is beyond question that Oak Grove was, and still is, not required to perform photochemical modeling as part of an ozone impacts analysis in its air permit application.¹⁴ There is simply no evidence to the contrary. Accordingly, Protestant's and OPIC's exceptions regarding the completeness of Oak Grove's ozone impacts analysis and application are without support in law, policy, or practice and are contrary to all relevant evidence in the record. These exceptions should not, therefore, be adopted by the Commission.

B. The Photochemical Modeling Provided by Oak Grove on Rebuttal Went Beyond TCEQ Requirements for Ozone Impacts Analysis in Air Permit Applications and Proved that the Proposed OGSES Will Have No Measurable Impact on the Evaluation of the DFW Nonattainment and Austin EAC Areas for EPA Attainment Demonstrations

In addition to Oak Grove's demonstration that the proposed facility will comply with the NAAQS for ozone through the ozone screening analysis required by the "long-standing interpretation of the Commission's rules, regulations, and guidance,"¹⁵ for rebuttal purposes Oak Grove exceeded the TCEQ requirements by performing photochemical modeling that proved that the OGSES will not alter compliance with the NAAQS for ozone in either the DFW nonattainment or Austin EAC areas. Despite the results of Oak Grove's photochemical modeling, Protestant and OPIC continue to argue

¹⁴ Tr. p. 892, line 22 to p. 893, line 21 (Alvarez); Executive Director Ex. ED-RH1, p. 12, lines 12-34 (Hamilton); Oak Grove Ex. 40, pp. 9-10 (Hamilton).

¹⁵ See Sandy Creek Order, Conclusion of Law No. 23.

that 40 C.F.R. § 52.21(k) sets an absolute bar to any contribution of ozone to these regions. However, as explained in Oak Grove's Closing Argument and subsequent Reply Brief, the federally-approved Texas Prevention of Significant Deterioration ("**PSD**") permitting program makes it clear that sources located outside of nonattainment areas in the state may contribute *de minimis* levels of pollutants to nonattainment areas.¹⁶

As set forth more fully in Oak Grove's Closing Argument, the error of Protestant's and OPIC's proposed interpretation of 40 C.F.R. § 52.21(k) is further evidenced by the Commission's May 25, 2006 order granting Sandy Creek Energy Associates, L.P.'s ("**Sandy Creek's**") application for a PSD permit.¹⁷ In granting this permit, the Commissioners concluded that despite the proposed facility's anticipated incremental impact on DFW ozone levels, it will not "measurably influence" ambient ozone concentrations in the DFW ozone nonattainment area.¹⁸ In reaching this conclusion, the TCEQ Commissioners interpreted their applicable rules to allow a *de minimis* ozone impact from a source outside of a nonattainment area and compared the proposed facility's estimated contribution to the defined *de minimis* values listed in 30 TEX. ADMIN. CODE § 101.1(22). Recognizing that *de minimis* values that are set in rule are on the order of 1% to 5% of the NAAQS, the Commissioners concluded in the Sandy Creek matter that an incremental ozone impact that is orders of magnitude below these percentages of the ozone standard is insignificant. In the present case, Oak Grove's maximum incremental contribution to any monitor, based on the photochemical modeling, is 0.07 ppb in the DFW nonattainment area which is 0.0875% of the 80 ppb

¹⁶ See 30 TEX. ADMIN. CODE § 116.161.

¹⁷ See generally Sandy Creek Order.

¹⁸ Sandy Creek Order, Findings of Fact Nos. 76-78.

ozone standard.¹⁹ Although not in nonattainment status, calculations of the predicted maximum incremental increase in the Austin EAC yield 0.112%.²⁰ Making a comparison similar to the Commission's finding in the Sandy Creek Order, Oak Grove's predicted incremental effect on DFW nonattainment and Austin EAC ozone levels is at least an order of magnitude "below the fraction of the applicable NAAQS that is defined as insignificant for other criteria pollutants."²¹ Therefore, compliance with the ozone NAAQS has been conclusively demonstrated by Oak Grove's photochemical modeling.

The foregoing approach to demonstrating NAAQS compliance was recently upheld by EPA's Environmental Appeals Board ("*EAB*") in its order denying review of a PSD permit that the Illinois Environmental Protection Agency ("*IEPA*") issued to Prairie State Generating Company, LLC ("*Prairie State*") authorizing the construction of a 1500-megawatt pulverized coal-fired electric generating facility.²² The modeling conducted by Prairie State predicted exceedances of the NAAQS for sulfur dioxide ("*SO₂*"), so further analysis was conducted to determine the extent, if any, to which the proposed facility was predicted to contribute to the identified exceedances.²³ Where the analysis indicated that the proposed facility would contribute to a NAAQS exceedance, IEPA used *de minimis* values, which it labeled "significant impact levels" or "SILs," to determine the facility's compliance with the NAAQS.²⁴ Where the analysis indicated that the proposed facility's predicted contribution to any exceedance at any receptor

¹⁹ Applicant's Closing Argument at 29.

²⁰ *Id.*

²¹ Sandy Creek Order, Finding of Fact No. 77.

²² *See In re: Prairie State Generating Co.*, PSD Appeal No. 05-05, at 133-144 (Aug. 24, 2006), [http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Recent~Additions/7414685644289CEB852571D4006785E2/\\$File/Denying%20Review%2047.pdf](http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Recent~Additions/7414685644289CEB852571D4006785E2/$File/Denying%20Review%2047.pdf).

²³ *See id.* at 137.

²⁴ *See id.* at 133, 137-138.

would be below the SILs at the time of the predicted violation, IEPA concluded that the proposed facility would not “cause, or contribute to” a violation of the NAAQS, as that phrase is used in § 165(a)(3) of the federal Clean Air Act.²⁵

Parties protesting issuance of the permit argued that the federal Clean Air Act unequivocally prohibits issuance of a permit where the proposed source would, in any way whether significantly or otherwise, cause or contribute to a NAAQS violation.²⁶ The EAB rejected this argument, citing substantial judicial precedent for EPA to impute concepts of significance into its air quality standards, as well as EPA’s long-standing interpretation of the phrase “cause, or contribute to” as referring only to significant, or non-*de minimis* contributions to NAAQS exceedances:

Courts have long recognized that EPA has discretion under the Clean Air Act to exempt from review “some emission increases on grounds of de minimis or administrative necessity.” *Alabama Power Co. v. Costle*, 636 F.2d 323, 400 (D.C. Cir. 1979). Moreover, EPA has long interpreted the phrase “cause, or contribute to” to refer to significant, or non-*de minimis*, emission contributions. This interpretation is reflected in both applicable EPA regulations and long-standing EPA guidance.²⁷

Protestant’s and OPIC’s insistence that 40 C.F.R. § 52.21(k) sets an absolute bar to any contribution of ozone to nonattainment areas is directly at odds with the EAB’s holding and the long-standing jurisprudence and EPA guidance discussed at length in the EAB’s opinion. Much like the protestants in the *Prairie State* case, Protestant and OPIC simply cannot identify any evidence that Oak Grove’s contribution of ozone to the DFW

²⁵ See *id.* at 137-138; see also 42 U.S.C. § 7475(a)(3) (requiring an applicant for a proposed major source to demonstrate, among other things, that the source will “cause, or contribute to” an exceedance of any NAAQS); 40 C.F.R. § 52.21(k)(1); TEX. HEALTH & SAFETY CODE § 382.085; 30 TEX. ADMIN. CODE § 116.161.

²⁶ See *Prairie State Generating Co.* at 133, 138-139.

²⁷ *Id.* at 139.

nonattainment and Austin EAC areas will be “anything more significant than de minimis or trivial.”²⁸

C. Oak Grove’s Photochemical Modeling Followed EPA Rules for Measuring Compliance with the 8-Hour Ozone NAAQS

In an attempt to undermine the results of the photochemical modeling performed by Oak Grove, Protestant questions Oak Grove’s modeling methodology because, as they claim, it did not consider the impacts of the facility’s “worst case” NO_x emissions.²⁹ However, given that the model results proved the incremental effects of Oak Grove will be orders of magnitude below the 1% to 5% levels set as *de minimis* for other NAAQS pollutants, it is clear that the Protestant’s “worst case” scenario would not yield a different legal conclusion from the modeling exercise that Oak Grove commissioned and, again, is not required of any air permit applicant. Nonetheless, as discussed at length in Oak Grove’s Closing Argument, the photochemical modeling introduced into evidenced by Oak Grove unquestionably followed EPA rules for measuring compliance with the 8-hour NAAQS for ozone.³⁰

While it is incontrovertible that Oak Grove was not required to perform photochemical modeling as part of an ozone impacts analysis in its air permit

²⁸ *Id.* at 144.

²⁹ It is important to note that the “worst case” emissions that Protestant claims may occur are mere hypothetical mathematical exercises that have no relationship to how the OGSES will actually operate and would require, at a minimum, OGSES to violate the general conditions of the proposed permit. As fully explained by Ed Cichanowicz, the lb/MMBtu NO_x values which Protestant claims are “worst case” emission figures are in no way relevant to the calculation of emissions for the proposed OGSES units. Tr. p. 493, line 16 to p. 496, line 20 (Cichanowicz). Furthermore, the ozone modeling analysis is still conservative and a realistic “worst case” in that it assumes both units are running together at their maximum generation capacity and maximum 30-day average NO_x emission rate for all hours modeled. Use of the maximum rates set for startup for both units and all hours of the ozone model, as suggested by Protestants, is completely unrealistic.

³⁰ Tr. p. 1185, line 22 to p. 1186, line 10 (Morris).

application,³¹ any evaluation of the modeling that was performed should consider the manner, according to federal rule, in which compliance with the 8-hour ozone NAAQS is demonstrated. Protestant's assertion that Oak Grove should model the highest allowable emission rate to determine the worst case is inconsistent with the way that compliance with the 8-hour ozone NAAQS is determined. That is, compliance with the 8-hour NAAQS for ozone does not consider the maximum monitored ozone concentration; rather, it considers only the average of the annual fourth-highest daily maximum 8-hour average concentrations. Thus, Protestant's point is defeated by the federal standards established for demonstrating compliance with the NAAQS, including the very definition of compliance with the NAAQS for ozone.³²

Furthermore, in pressing this "worst case" argument, Protestant only serves to highlight the absence of an established technique or methodology for utilizing photochemical modeling in the context of an individual permit application. Neither the EPA nor TCEQ has defined a methodology for using photochemical modeling in this context.³³ A defined methodology would resolve such issues, if photochemical modeling were ever to become a requirement. For present purposes, however, it is enough to note that Protestant's assertion that Oak Grove should have modeled worst case NO_x emissions merely underscores the indisputable absence of rules, guidance, and methodology addressing the application of photochemical modeling to individual permit applications. Without question, a contested case hearing is not the appropriate forum for

³¹ Tr. p. 892, line 22 to p. 893, line 21 (Alvarez); Executive Director Ex. ED-RH1, p. 12, lines 12-34 (Hamilton); Oak Grove Ex. 40, pp. 9-10 (Hamilton).

³² See 40 C.F.R. § 50.10(b) (stating that "[t]he 8-hour primary and secondary ozone ambient air quality standards are met at an ambient air quality monitoring site when the *average of the annual fourth-highest daily maximum 8-hour average ozone concentration* is less than or equal to 0.08 ppm" (emphasis added)).

³³ Tr. p. 1185, lines 20-22 (Morris).

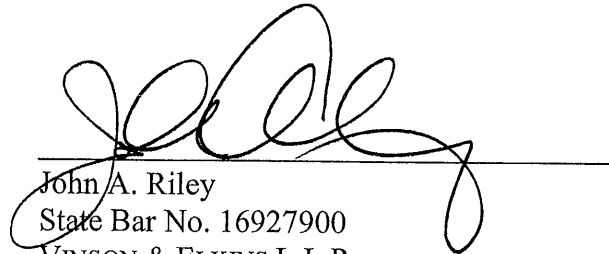
a permitting agency to adopt new permitting criteria and procedures.³⁴ Thus, Protestant's and OPIC's suggested findings, which would subject Oak Grove to permitting criteria that have never before been required of an air permit applicant, much less defined, should not be adopted by the ALJs or the Commission.

CONCLUSION

For the foregoing reasons, Protestant's and OPIC's exceptions to the ALJs' PFD are not supported by either evidence or law and provide no basis for amending the ALJs' PFD or proposed findings as sought by these parties. The exceptions filed by the Executive Director, however, seek to correct errors in the PFD in interpreting important TCEQ BACT guidance and policy that are generally applicable to all air permit applications, that, if left uncorrected, will have far-ranging consequences for Oak Grove and other air permit applicants in the State. Therefore, Oak Grove respectfully requests that the ALJs amend the PFD consistent with the exceptions filed by Oak Grove and the Executive Director and recommend issuance of the permit or, in the alternative, that the Commission adopt the proposed order attached to Oak Grove's exceptions brief granting TCEQ Air Quality Permit Nos. 76474/PSD-TX-1056, as the permit was drafted and proposed by the Executive Director.

³⁴ See *Texas State Bd. of Pharmacy v. Seely*, 764 S.W.2d 806, 815 (Tex. App.—Austin 1988, writ denied) (setting aside an order revoking a licensee's license because the agency first notified the party of an ad hoc rule in its final order); *Madden v. Texas Bd. of Chiropractic Examiners*, 663 S.W.2d 622 (Tex. App. — Austin 1983, writ ref'd n.r.e.) (holding that the Board failed to give notice of an ad hoc rule prior to the hearing and so deprived the applicant of the knowledge of the specific standard to which he must comply).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John A. Riley", is written over a horizontal line. The signature is stylized with loops and flourishes.

John A. Riley

State Bar No. 16927900

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COUNSEL FOR APPLICANT OAK
GROVE MANAGEMENT COMPANY
LLC

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Applicant Oak Grove Management Company LLC's Responses to the Exceptions to the Administrative Law Judges' Proposal for Decision has been served on the following via hand delivery, facsimile, electronic mail, first class mail, and/or overnight mail on this the 22nd day of September, 2006.

The Honorable Tom Walston
The Honorable Carol Wood
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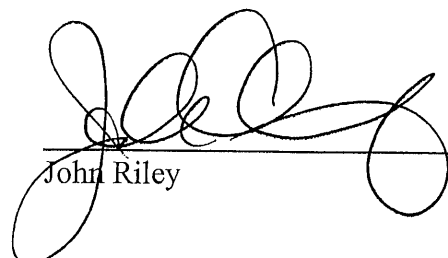
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